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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-152

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Petitioner,

vs.

NED E. WILLIAMS, DIRECTOR
OHIO ENVIRONMENTAL PROTECTION AGENCY,
and
NORTHERN OHIO LUNG ASSOCIATION,

Respondents.

On Petition For A Writ of Certiorari
To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The subject Petition does not involve a federal question of substance not heretofore determined by this Court, and the Ohio courts have not decided this case contrary to applicable decisions of this Court.

ARGUMENT

PROCEDURAL DUE PROCESS DOES NOT REQUIRE THAT A PERSON SUBJECT TO ADMIN-

ISTRATIVE REGULATIONS BE GIVEN AN ADJUDICATORY HEARING TO CHALLENGE THE REGULATIONS, ESPECIALLY WHERE PUBLIC QUASI-LEGISLATIVE HEARINGS WERE HELD, THE PERSON PARTICIPATED, AND ADMINISTRATIVE APPEALS WERE AVAILABLE BUT NOT EXERCISED.

A. *Petitioner Had Numerous Opportunities To Challenge The Ohio Air Pollution Regulations But Failed To Exercise The Opportunities At The Right Time And In The Right Forum.*

It is well established that quasi-legislative decisions in administrative rule-making do not require trial type hearings. K. Davis, *Administrative Law Text*, Section 7.05 (3d ed. 1972).

The Cleveland Electric Illuminating Company's ("CEI") claim is that an adjudication hearing is required where there was no other forum to challenge the regulation. There is no need to consider when an adjudication hearing may be required because CEI's underlying premise is erroneous. It has not shown, nor can it, that it has not had the opportunity to object to the air pollution regulations involved.

CEI advanced this same argument before the United States Court of Appeals for the Sixth Circuit in *Northern Ohio Lung Association, et al. v. EPA*, 572 F.2d 1143, 1148 n. 9 (6th Cir. 1978). The Sixth Circuit refused to consider the argument due to the available opportunities for such a challenge, citing its rejection of the same argument by another electric utility in *Ohio Environmental Council v. U.S. District Court*, 565 F.2d 393, 397 (6th Cir. 1977), where the Court stated:

> "We decline to reach defendant's arguments that enforcement would unconstitutionally deny it a due process hearing, for even if a Section 307(b)(1) hearing were unavailable in the existing circumstances, there has been no showing that defendant had no other opportunity to voice its objections to the emission limitations involved here. *See* Section 110(a)(1), 42 U.S.C., Section 1857c-5(a)(1) (notice and hearing required in formulation of state plan); Ohio Rev. Code Ann. Section 3745.04 (appeals to Environmental Board of Review)."

The same argument was also rejected in *West Penn Power Co. v. Train*, 538 F.2d 1020 (3d Cir. 1976).

CEI has had the following opportunities to object to the Ohio air pollution regulations.

First, the regulations were adopted by the Air Pollution Control Board in 1972, after notice and public hearings in accordance with Section 3704.04 and Sections 119.01 to 119.03 of the Revised Code.[1] CEI participated in those hearings. Section 110(a)(1) of the Clean Air Act, 42 U.S.C., Section 7410(a)(1) required that these regulations be adopted after notice and public hearing.

Second, the regulations adopted by the Air Pollution Control Board were self-executing and immediately applicable to CEI. Violations were prohibited and were subject to criminal penalty. CEI did not seek a state court challenge to the regulations by a declaratory judgment action. *Burger Brewing Co. v. Liquor Control Comm'n*, 34 Ohio St. 2d 93 (1973).[2]

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[1] The ambient standards were adopted by U.S. EPA nationally. CEI could have challenged them in the District of Columbia United States Court of Appeals, 42 U.S.C., Section 7607. It did not.

[2] CEI asserts that a declaratory judgment action is not available, citing *State, ex rel. Williams v. Bozarth*, 55 Ohio St. 2d 34 (1978), which held that such attacks on Ohio EPA

Third, the regulations were approved by action of the U.S. EPA under Section 110 of the Clean Air Act and CEI appealed that approval to the Court of Appeals. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). In that appeal CEI obtained further opportunity to object.

Fourth, U.S. EPA reapproved the Ohio regulations through informal rule-making. CEI participated and appealed the reapproval to the Court of Appeals. *Buckeye Power, Inc. v. EPA* ("*Buckeye II*"), 525 F.2d 80 (6th Cir. 1975). CEI's petition for review was dismissed.[3] It did *not* appeal that dismissal to the Supreme Court.

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actions must be by way of an administrative appeal to the Environmental Board of Review under Section 3745.04, Ohio Revised Code. This assertion is misleading because the regulations CEI complains about were adopted by the Ohio Air Pollution Control Board in February, 1972, before the creation of the appeals board. A declaratory judgment action was available at that time.

[3] In support of its claim of inconsistency, CEI cites language in *Buckeye II*, that the technological and economic infeasibility claims were being dealt with at the state agency level in the variance hearing held by the Ohio EPA Hearing Panel, in which an attack upon the regulations was allowed. Petition, at 12. In refusing to hear those claims, the Sixth Circuit correctly noted that such claims *could* be considered at the state level, however, it did not purport to tell the state at what proceedings they could be raised. The irony of CEI's position is that the attack upon the regulations relied upon by CEI was erroneous as a matter of state law. Thus, the Hearing Panel's recommendations were rejected by Ohio EPA, the Environmental Board of Review, and the Franklin County Court of Appeals, and not reviewed by the Ohio Supreme Court. Nevertheless, the Sixth Circuit could not have considered those claims. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

Fifth, in July, 1975 Ohio EPA amended the Ohio SIP deadline regulation which CEI challenges, changing the deadline for compliance from July 1, 1975 to April 15, 1977. This amended regulation was adopted after notice and public hearings in accordance with Section 3704.04 and Sections 119.01 to 119.03 of the Revised Code. CEI participated in these hearings and objected to the specification of the deadline.

Sixth, after Ohio EPA adopted the amended regulation on July 28, 1975, CEI had the opportunity to obtain a *de novo* review hearing before the Environmental Board of Review under Section 3745.04 of the Revised Code. *It did not exercise this right to appeal.*

Seventh, Ohio EPA's amended regulation was submitted to U.S. EPA for approval. U.S. EPA approved the regulation in informal rule-making procedures. 41 Fed. Reg. 2099 (Jan. 14, 1976) and 41 Fed. Reg. 41691 (Sept. 23, 1976). CEI participated in these proceedings objecting to the regulations.

Eighth, after U.S. EPA approved the amended regulation setting the deadline at April 15, 1977, CEI appealed the approval to the Court of Appeals. *Northern Ohio Lung Association, et al. v. EPA*, 572 F.2d 1143 (6th Cir. Feb. 2, 1978). After its petition for review was dismissed, CEI did *not* appeal or file for a writ of *certiorari* from this Court.

Due process does not require that CEI succeed in its challenges. The petition for a writ of *certiorari* should be denied.

B. *Ohio Court Decisions Are Not Inconsistent With Either Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) Or Union Electric Co. v. EPA, 427 U.S. 246 (1976).*

CEI claims that the Franklin County Court of Appeals misconstrued the decision in *Train v. NRDC*,

421 U.S. 60 (1975). *See* Petition, at 16. This assertion is erroneous.

The Franklin County Court of Appeals in *Cleveland Electric Illuminating Co. v. Williams*, Case Nos. 76AP-929 and 938 (December 8, 1977), Appendix, beginning at A-4, correctly referred to the *Train v. NRDC*, *supra* decision as *allowing* a state to provide for variances beyond the attainment date for ambient standards "only insofar as such post-attainment variances do not prevent attainment or maintenance of ambient air quality standards" in the state. App. at A-17. However, the Court of Appeals held that Ohio law did not permit post-attainment variances. It stated that Ohio Revised Code Section 3704.05(A) "flatly prohibits" violations of emission limitations without a variance and that "R.C. 3704.03(H) authorizes, but does not require, the Director to issue variances from his regulations to sources of air pollution which have [not] attained compliance with applicable emission standard regulations." *Id.* The Ohio EPA (and the prior Air Pollution Control Board) had interpreted and implemented this section by authorizing variances *only* to the attainment date. *See* OAC 3745-17-04 and OAC 3745-35-03 (formerly designated EP-32-03), quoted in App., at A-10. The state agency thus by regulation terminated its discretion to issue variances after the attainment date.

The Franklin County Court of Appeals, as a matter of Ohio law, held,

> "Considering the entire context of R.C. Chapter 3704. and the manner in which it was enacted, it is reasonable to interpret R.C. 3704.03(H) to prohibit issuance of a variance that is in conflict with the Federal Clean Air Act, in particular, where the variance defers compliance beyond the time established for national enactment [sic], or which prevents timely attainment of the air quality standards of the act [sic]." Appendix, at pages A-17-18.

The Court went on to explain that the regulation "places the Ohio act in compliance with national standards giving rise to adoption of the law in Ohio."[4] The Court concluded,

> "Thus, the regulation of the Board [Air Pollution Control Board] prohibiting any variances beyond April 15, 1977, is lawful in accordance with the mandates of Ohio law, as set forth in R.C. 3704.03, which was promulgated for the purpose of achieving and maintaining compliance with national ambient air quality standards." Appendix, at A-18.

It is apparent that the Franklin County Court of Appeals correctly interpreted *Train v. NRDC*, 421 U.S. 60 (1975). In the context of the Ohio statutory scheme which prohibited all violations of the emission regulations without a lawful variance, and which was intended to comply with the national objectives of timely attainment of air quality standards by a date certain, the Court held that it was reasonable to prohibit variances after the attainment date.[5]

Petitioner cites dictum in *Union Electric Company v. EPA*, 427 U.S. 246 (1976) that "claims of economic and technological infeasibility" could be considered by

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[4] U.S. EPA regulations required that the attainment date be specific and that every source subject to a control strategy requirement "must comply with such requirement no later than the specified attainment date." 39 Fed. Reg. 34533.

[5] This case does not address the issue in *Train v. NRDC*, where the state statute allowed post-attainment variances and the Court held that the state plan was still approvable but revisions must not jeopardize timely attainment of National Ambient Air Quality Standards. Also, in this case, evidence was that ambient standards were being violated. *See* Environmental Board of Review decision, Appendix, at A-62-63.

the state in "formulating the implementation plan." Petition, at 13. However, CEI has made *no* showing (nor could it), that such claims were not considered by Ohio in adopting the regulations originally. In fact, CEI was not only accommodated for three years (from 1972 to 1975) but for five years (from 1972 to 1977), due to the change in the attainment date. *See Northern Ohio Lung Asso. v. EPA*, 572 F.2d 1143 (6th Cir. 1978).

In summary, CEI's petition for a writ of *certiorari* is due to its failure to elect the appropriate time and forum in which to litigate its technological and economic infeasibility claims. It has had the opportunity to challenge the regulations and it has done so. It has not been successful. Moreover, CEI fails to understand that *Union Electric, supra*, did not purport to tell the states when, how and to what extent they should consider these infeasibility claims. The holding of the highest courts in Ohio is that CEI raised these claims in the wrong proceeding and that the state regulations are reasonable. Due process has not been denied and the issues raised by CEI are insubstantial.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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ADDENDUM

Ohio EPA Air Pollution Regulation 3745-15-05. *Control plan compliance schedule.*

"Except as otherwise specified, compliance with the provisions of all regulations of the Board shall be according to the following time schedule:

"(A) New source.
All new sources shall comply as of initial operation.

"(B) Existing sources.
All owners or operators of existing sources of air contamination shall demonstrate to the satisfaction of the Board that such sources are in compliance with all regulations of the Board. All existing sources not in compliance as of the effective date of this regulation shall, by the time required in 3745-35-03 for submission of a variance application, cease any operation which results in a violation of any regulations of the Board, or else prepare and submit to the Board, as required by 3745-35-03, a control plan, including necessary emission data, and schedule for achieving compliance, such plan and schedule to contain a date on or before which full compliance will be attained, and such other information as the Board may require. Such plan may be approved, modified, or rejected by the Board. If approved by the Board, such date will be the date on which the person shall comply. The Board may require persons submitting such a plan to submit subsequent periodic reports on progress in achieving compliance. If a compliance schedule is rejected, the operation for which a variance is sought shall cease."

Ohio EPA Air Pollution Regulation 3745-17-04. *Compliance time schedule.*

"Attainment of established air quality standards for particulate matter and sulfur dioxide within the area, through the orderly application of pollution control techniques, shall be accomplished as soon as possible, but in no event shall such time be later than April 15, 1977."

Ohio Revised Code, Section 3704.04. *Regulations subject to administrative procedures act.*

"The adoption, modification, and repeal of regulations and the issuance, revocation, modification, and denial of permits and variances under Chapter 3704. of the Reivsed Code shall be in accordance with sections 119.01 to 119.13, Chapter 3745, and division (H) of section 3704.03 of the Revised Code."